

**CITY OF MORGAN HILL  
SPECIAL CITY COUNCIL MEETING  
MINUTES – JUNE 9, 2004**

**CALL TO ORDER**

Mayor Kennedy called the special meeting to order at 6:02 p.m.

**ROLL CALL ATTENDANCE**

Present: Council Members Carr, Chang, Tate and Mayor Kennedy  
Late: Mayor Pro Tempore Sellers

**DECLARATION OF POSTING OF AGENDA**

City Clerk Torrez certified that the meeting's agenda was duly noticed and posted in accordance with Government Code 54954.2.

***City Council Action***

**CLOSED SESSIONS:**

City Attorney Leichter announced the below listed closed session item.

1.

**CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION**

Authority: Government Code Sections 54956.9(b) & (c)  
Number of Potential Cases: 1

**OPPORTUNITY FOR PUBLIC COMMENT**

Mayor Kennedy opened the Closed Session item to public comment. No comments were offered.

**ADJOURN TO CLOSED SESSION**

Mayor Kennedy adjourned the meeting to Closed Session at 6:04 p.m.

**RECONVENE**

Mayor Kennedy reconvened the meeting at 7:30 p.m.

**CLOSED SESSION ANNOUNCEMENT**

City Attorney Leichter announced that the closed session was continued to the conclusion of this evening's agenda.

**SILENT INVOCATION**

### **PLEDGE OF ALLEGIANCE**

At the invitation of Mayor Kennedy, former Planning Commissioner Dennis Pinion led the Pledge of Allegiance.

### **PUBLIC COMMENT**

Mayor Kennedy opened the floor to public comment for items not appearing on this evening's agenda.

Dennis Pinion indicated that Senate Bill (SB) 1327 is waiting to go through the Assembly Committee on water, parks, and wildlife. He said that the purpose of the Bill is to improve the protection of State parks. He said that over the past several years, despite the fact that there are state laws that purports to protect state parks, many things are being planned to take place in parks that were not intended for. He requested that the Council talk to legislators or individuals who can assist in the passage of this bill. He stated that he wished he was in attendance a couple of meetings back when the Council adopted a resolution on high speed rail as he would have liked to comment on the item. He said that it is his understanding that the Council did not take a position on the resolution because it felt there was insufficient information available. He said that the issue with high speed rail going through Henry Coe State Park is the very fact that there is insufficient information contained in the EIR. Yet, the first project level EIR is the one that will make the decision as to what path the high speed rail will take to San Jose. He noted that last November the Council passed a resolution stating that high speed rail should not go through Henry Coe State Park. He requested that the Council remember this action and that it does what it can to support this stand. He distributed a CD produced by a group that he works with that explains some of the issues relating to high speed rail.

Council Member Carr stated that as a member of the Council's Legislative Subcommittee, the Subcommittee will review SB 1327. He said that the Council did adopt a resolution in support of high speed rail, including a southern route that would go through Silicon Valley before reaching San Francisco. He indicated that the Council eliminated one of the "whereas" clauses that talked about Henry Coe State Park because the Council was concerned about the amount of information that may or may not be available. He stated that when the latest resolution was passed on, the Council directed staff to attach the previous resolution where the Council stated that they did not believe Henry Coe State Park is the correct path to go through. He clarified that the Council would not be changing its position and that it is the Council's current position that it does not support high speed rail thru Henry Coe State Park.

Mayor Pro Tempore Sellers entered and was seated.

Mr. Pinion informed the Council that he attended a hearing that was held in San Jose a couple of weeks ago on the issue of high speed rail. He said that there were many individuals in attendance representing different governmental agencies, indicating that approximately half of them opposed high speed rail going through Henry Coe State Park. He said that it is his understanding that there are supporters of this route in the City of Merced. He informed the Council that SB 1327 will be going before the Committee on June 22. Therefore, there is not much time to write a letter regarding this bill.

Mayor Pro Tempore Sellers indicated that he just arrived as he attended the graduation that took place at Charter School. He congratulated the graduating students, in particular his son.

No further comments were offered.

## ***City Council Action***

### **PUBLIC HEARINGS:**

#### **1. REVIEW OF THE FINAL ENVIRONMENTAL IMPACT REPORT FOR THE INSTITUTE GOLF COURSE AND MATHEMATICS CONFERENCE CENTER – Resolution No. 5801**

Planning Manager Rowe presented the staff report indicating that the purpose of this evening's meeting is to address the final environmental impact report (EIR) for the Institute Golf Course and the project zoning amendment application. He said that the specific actions being requested are: 1) conduct the review of the final EIR document, 2) adopt a resolution that certifies the final EIR, subject to findings contained in exhibit A of said resolution; 3) conduct a public hearing on the zoning amendment application and 4) adopt an ordinance that would approve the zoning amendment subject to conditions contained in exhibit C to the ordinance. He said that the purpose of the public hearing is to receive comments on the PUD zoning for the project and not for the purpose of receiving additional comments on the EIR. He informed the Council that when the Planning Commission reviewed this item, there were comments received on the EIR as well as the zoning application. He stated that there have been two successful opportunities for comments from the applicant and interested parties in the EIR process: 1) the initial draft EIR and 2) the revised draft EIR. He said that each of these documents were circulated for a 45-day public review period. There was also a public hearing held on the draft document by the City Council. He said that the revised draft was prepared based on the request for additional information of the comments contained in the initial draft EIR. He stated that the final EIR contains extensive responses to the comments received on the revised draft in the amount of 96 comment letters. He informed the Council that CEQA, at this point, does not require any further public hearings be held on the EIR or that the City respond to any further comments on the EIR. However, it is the Council's prerogative to do so. Given the lengthy opportunity that has been previously provided for comments in the EIR, staff requests that the speakers limit their comments to matters relevant to the PUD zoning which include the conditions of zoning approval. He proceeded to provide the Council with a brief project overview of the request for a PUD rezoning to allow the continued operation of an existing 18-hole golf course, including the use of the renovated hanger building as a maintenance building, demolition of the existing restaurant building, constructing a new building in its place for the use of a headquarters for the American Institute of Mathematics and renovation/use of other structures on site. He noted that the golf course, as presently configured, was built without benefit of permit from the City. He introduced Michelle J. Yesney, EIR consultant; and Roger Beers, attorney retained by the City as a legal expert on CEQA matters and to consult on the preparation of the EIR.

Michelle Yesney, Vice-president with David Powers and Associates, indicated that she assisted City staff in the preparation of the EIR on this project. She indicated that she began to work with the City in

May 2000 on the EIR, evaluating the project description. She indicated that she could only evaluate the impacts from the project based on what was understood to be the “project.” Her firm has gone through two draft EIRs and the preparation of a final EIR which responds to comments received from approximately 96 letters. Among these were 116 pages of comments provided by the project proponent and responses were provided to all of these comments. She stated that the final EIR has been the subject of two lengthy Planning Commission meetings which took place following the Council’s workshop on the EIR. She informed the Council that it now has before it the complete EIR document, including the draft EIR, the final EIR, some text clarifications requested by the Planning Commission, extensive input on the project, its impacts and mitigations from a number of responsible and trustee agencies and the public. She indicated that the mitigation package is one of the most complicated seen in a project EIR. As many of the mitigations are characterized in the EIR as mitigations not included in the project, it becomes a difficult record keeping effort just to keep track of them as well as the mitigation measures that are proposed. She stated that a pivotal agency in the process has been the US Fish and Wildlife Service because they are the responsible agency for enforcing the Federal Endangered Species Act. She said that there are statements made in the EIR and statements made in public hearings that indicate a willingness, on the part of the project proponent, to abide by mitigation measures considered necessary by the US Fish and Wildlife Service. She read into the record excerpts from a letter sent to the City dated February 14, 2004 from the US Fish and Wildlife Service and has been included in the Final EIR. She informed the Council that in attendance were Dan Stephens, senior ecologist with HT Harvey Associates, who prepared the biologist analysis in the EIR; and Norman Hantzsche, president of Questa Engineering, who prepared the hydrology and water supply analysis in the EIR, and who would go over some of the more complex mitigation measures that were not incorporated into the project at the time the EIR was circulated.

Dan Stephens focused his portion of the presentation on the setback areas which are proposed along the creeks and ponds of the site. He stated that the setbacks are critical to preserving water quality on site as well as wildlife habitat values, especially for the federally listed red legged frog and other sensitive wildlife uses within the riparian corridor. He indicated that the riparian habitat found on this site is disappearing in California at an alarming rate over the past decades. This type of riparian habitat supports some of the richest assembly of wildlife of any habitat in California. He identified the different setbacks that are being proposed for the project site. He said that primary goals of setbacks for the site are to: 1) buffer the wildlife from disturbance in the maintenance activity and golf course use; 2) serves to filter water that drains across the landscape toward the creek before reaching the sensitive aquatic habitat within the creek; 3) serves to protect the riparian habitat and are an important habitat element for forging and disbursement by birds and red legged frogs in tandem with the riparian habitat; and 4) is a protective aspect for vegetation. He indicated that the first setback at 30 feet is considered the absolute minimum setback to protect the water quality within the creek and the aquatic habitat; immediately below that is a 50-foot water quality setback; and below this is a 70-foot setback which is an average setback recommended by the US Fish and Wildlife Service. Under certain circumstances, the US Fish and Wildlife Service believe that there could be a minimum setback of 30-feet on average. It is being recommended that a 10 foot setback from the edge of the pond be reviewed in order to allow filtering of waters and movement along landscape into the aquatic habitat.

Norm Hantzsche, environmental engineer, indicated that he prepared the hydrology, water quality, and water supply aspect of the EIR. He addressed the mitigation and setback requirements necessary to

protect the in stream water quality within the project area as well as downstream areas for the aquatic organizations/habitat of the creek. He said that the golf course poses a potential threat to water quality through the use of fertilizers, herbicides and pesticides to maintain the turf grass. The purpose of the setback is to provide a buffer area where you would not have the application of the chemicals, limiting the opportunity for overspray or spillage in close proximity to the receiving water. Also, it will provide an area of unmaintained, more natural vegetation that can act as a filtering mechanism for deposition, the out take and reduction of any chemicals that may be washed with runoff with the receiving water. He stated that the mitigation measures proposed in the EIR include a 50 foot setback measured from the center line of the creek. There is a minimum 30-foot setback in case the golf course is graded such that the runoff from the turf does not flow into the creek but away from it before reaching the stream. He indicated that testimony and information supplied by the applicant that the Regional Water Quality Control Board's standard or policy is a 30 foot setback to the centerline of the creek was not correct. He said that the setback is 30 feet to the edge of the highest anticipated water level. He said that there are portions of the project site where the anticipated high water level extends well beyond the center line of the creek and if you were to take 30 feet from this point, you would end up with a larger setback than is being proposed with the 50 feet from centerline. He recommends the use of the centerline to be consistent with the other setback guidelines as it is easily identifiable. He said that an additional hydrology study would need to be conducted to identify the highest anticipated water level but that it would be larger in some portions of the creek, including additional setbacks than what is being recommended. He stated that there has also been testimony or written material submitted suggesting that there has been a lot of sampling done to demonstrate that there has been no impact. He informed the Council that it was his belief that there has been no sampling of the creeks but limited sampling of the lakes. He said that he is interested in water quality protection and that it is not known whether there would be run off of the chemical applications that may wash into the lakes or creeks with an out of season storm.

Mr. Rowe noted that the recommended action before the Council this evening is to consider a resolution that includes an extensive list of findings relative to the EIR. He stated that there is one environmental mitigation measure that cannot be reduced to a less than significant level. This is with respect to the cumulative loss to agricultural land. He said that the resolution contains language that acknowledges that there is no feasible way to mitigate the loss of agricultural land and identifies the project benefits that would be considered for overriding this one measure.

Council Member Chang stated that she was trying to figure out the riparian corridor setback. She said that the Council was told that the riparian corridor setback was set at 100 feet. She requested an explanation for the 100-foot setback requirement.

Mr. Stephens said that the 100 foot setback is a number that is generally accepted in the community of biologist as well as resource agencies as an adequate distance to provide the safety feature and the wildlife habitat buffering for this sensitive habitat. He stated that it is an estimation of the buffer area that is appropriate for high quality habitat. He noted that this has been substantiated in the riparian corridor policy adopted by the City of San Jose in March 1999. The document addresses riparian habitat as the "cookbook" that lays out the appropriate setbacks for the various habitats, including the types of encroachments allowed within these setbacks. He said that the basic standard, according to this document, is that "all buildings, other structures, impervious surfaces, outdoor activity areas, ornamental

landscape areas, such as golf courses, should be separated a minimum of 100 feet from the edge of the riparian corridor or the top of bank, whichever is greater.” He said that there are numerous locations in the document that refers to development adjacent to riparian habitat that should generally be setback 100 feet from the outside edge of the riparian habitat. He said that this is a setback number that is a rule of thumb that is applied. He said that there are circumstances where the setbacks can be greatly reduced. He said that there are areas on the project site where much of the riparian habitat, of the lower reaches, have been disturbed in the past and is of lower quality. Therefore, the setbacks have been significantly reduced in this area to 25 feet as this habitat is less sensitive and requires less buffering to preserve its water quality and its habitat.

Council Member Chang inquired whether the State of California or other regulatory agencies have a similar format.

Mr. Stephens responded that he has received many comment letters from the California Department of Fish Game who accept the 100 foot setback for the beginning standard of a riparian habitat setback.

Planning Manager Rowe said that the responsible trustee agencies that commented on the EIR, including excerpts from the US Fish and Wildlife Service, have indicated their agreement in support of the mitigation that includes the 100 foot riparian habitat setback.

Mr. Stephens informed the Council that the unmaintained rough around the perimeter of the golf turf would be 10 feet wide and the vegetated shelf within the pond could be 5-10 feet wide, resulting in a 15-20 foot setback. He said that the vegetative shelf would be up to approximately 50% of the perimeter of the pond but not the entire perimeter of the pond.

Mr. Hantzsche indicated that you would measure from the edge of the anticipated highest water level to 30 feet which would occur during high run off flood condition of the creek.

Mayor Pro Tempore Sellers noted that Mr. Hantzsche indicated that no testing has been done of the creeks. He inquired whether testing would be done by the City’s experts or has the applicant provided Mr. Hantzsche with information that verifies testing.

Mr. Hantzsche indicated that his firm did not perform water quality testing but that he received data from the applicant. He stated that he reviewed and incorporated the information into the environmental document that includes samples of each of the lakes/ponds. The information included sampling of the irrigation water and a spring located at the upper part of the developed course. However, there were no sampling results provided for the creeks.

Planning Manager Rowe informed the Council that the temporary use permit included a condition that required that the applicant conduct monthly samplings. He said that this has been performed by the applicant, not by the City or third party, with the sampling results being submitted to the agencies that requested them for review during the preparation of the revised draft EIR. At the time the sampling was done, water was not flowing in the creeks. He stated that he did not believe that the City received sampling results from stream waters.

In response to Council Member Tate's question, Mr. Hantzsche stated that the Regional Water Quality Control Board only uses the high water mark and does not use the centerline standard. He said that this could be interpreted to be the 100-year storm event. He said that there is hydrology information that indicates what the level of flooding would be on the site from Corralitos Creek during a 100 year flood condition. He said that the Board does not specify to this level. It could be that a 10 year flood level could be used by different regional water boards. He said that this criteria/guidance occurs in their basic plan, but that it is not a hard and fast rule. He felt that part of the explanation for why it is not explicitly stated as a certain frequency storm event is due to the fact that it requires another level of study which is easy to do when you want a field determination of where the high water mark is on a particular drainage area. To undertake a study to determine the 10-year, 50-year and the 100-year storm is a lot of additional work. He said that judgment has to be exercised and that it is probably the thinking of the Board in using this language that it has some flexibility to it. He said that there are some areas that will have a deep channel in some of the upper reaches of Corralitos Creek. The width and spread of the waters at high flow will not be more than 10-20 feet wide. Taking the setback 30 feet from this point will give you a lesser setback. However, in the other areas where it is spread wider, it will result in a greater setback. He said that an argument could be made to look at these areas and apply the 30 feet from edge of high water marks. He indicated that these could be steeper areas, the runoff would be at a faster pace in those areas, and may contribute to less filtering activities. He stated that the average of 70 feet is the buffer specific to habitat and not water quality.

Mayor Kennedy opened the public hearing.

Stephen Sorenson, speaking on behalf of the applicant, stated that the intent of this project is to create a university campus like environment in Morgan Hill, indicating that the project is modeled after Stanford University. He said that the benefits of the project to the community are numerous. He indicated that the math conference will place Morgan Hill on the map, bringing a world class math institute to the City while the golf course provides opportunities for funding of local charities. He said that the golf course is an integral part of the business model of the project. He said that the EIR has focused primarily on the golf course. The issues of the EIR, as addressed, fall under two categories: 1) impacts relating to the construction of the golf course (i.e., comparison of the prior condition versus the current condition); and 2) impacts related to the ongoing operation of the golf course. He stated that the analysis of the impacts related to the construction of the golf course was led by the US Fish and Wildlife Service. As a result of the analysis prepared by the Fish and Wildlife Service, they made some requests to which the applicant agreed. These requests include the purchase of offsite mitigation acreage as well as a plan to plant more desirable vegetation within the confines of the riparian areas. Regarding the second category of impacts, the ongoing operations of the golf course, he stated that these fall into five broad categories: 1) surface water contamination; 2) the California red legged frog; 3) riparian habitat; 4) ground water depletion; and 5) nitrate loading of the aquifer.

Randy Long informed the Council that the Fish and Wildlife Service wrote 2 letters and that their latest letter stated that they would support all of the mitigation measures. The first letter dated July 15, 2003 is the one driving a settlement agreement that they wish to work with the applicant, indicating that the applicant has agreed to the agreement; the purchase of 51 acres offsite and on site to restore the creek. It is proposed to replant the riparian area that was removed before the applicant moved on site. He said that this letter is driving a lot of what is being done in a parallel process. The applicant is working with

the Fish and Wildlife Service to pursue their desire to implement the creek plan as soon as possible. He stated that the 30 foot setback was adopted by the Fish and Wild Service and comes from the Regional Water Quality Control Board and talks about highest reach of water. He said that the terminology of a creek is a misnomer. He said that an earlier study prepared by Mattern and Associates showed that the 100 foot storm would not leave top of bank in the lower part of the water shed. He indicated that water is confined at the top of the bank up and down the watershed. The water would not spill out into the waterway in a big deluge and that it is a stabilized system. He indicated that the study was submitted and analyzed as part of the process.

Mr. Long indicated that they have conducted ongoing water monitoring sampling, a lot of this driven by the temporary use permit application. He stated that the samples are turned in to a local laboratory immediately upon taking the samples. The State certified water quality sampling laboratory located on Jarvis Drive prepared an 11 page report that talks about the pesticides, herbicides, nitrates, nitrogen, etc. He submitted a summary of the results of all the lakes sampled, including creek samples. He indicated that it is difficult to get creek samples. There were two water samplings collected in December 2003 and January 2004 during a storm event. He informed the Council that all of this information has been submitted to the City. He said that the Fish and Wildlife Service agreed that there is an area where you cross the creek with play, where a narrower buffered area was needed. He said that an undulated buffer is proposed and that in the narrow places, there would be a 30 foot buffer. He said that the 30-foot buffer is driven by the Regional Water Quality Control Board as a construction buffer. He indicated that all that is being done is watering grass and applying fertilizer to the grass areas. A lot of digging of the area that could flow down in sediment is not being done. He stated that there are a lot of setback numbers without any backup information or conclusions. He indicated that the project is trying to follow with what the Water Quality Control Board and other agencies have requested because it is a mandate that they have to adhere to in order to obtain a permit. If required to provide a 100-foot buffer, he would remove t-boxes and that would cause a lot of unnecessary construction, earthmoving and possible pollution from sediment that could wash into the creek. He stated that the applicant would like to stay within the arrangement with the Fish and Wildlife Service and approved by the Regional Water Quality Control Board who approved the 30-foot buffer from the high water mark being requested. He felt that this requirement would be a lot less intrusive to the environment from what is being proposed. He stated that the study states that the 100 year flood would not leave the top of bank and that water would be contained within the banks.

Council Member Chang requested a definition of a “high water mark.”

Mr. Long said that an ordinary high water mark, as defined by the Corp of Engineer, is that level below top of bank where you see deposition of debris, logs, pieces of sticks, grass, and where high flows have washed the flats. When the water submits, it leaves debris on the bank. You look at the debris and that is where you establish the ordinary high water make, the average high water flow of a normal storm.

Council Member Chang said that San Luis Reservoir’s high water mark is 20 feet lower than it was three months ago. She felt that during the rainy season, the high water mark would be at the top of the stream and that in the dry season, the high water mark would be at the bottom.



Mr. Long said that you use the average/usual high water mark, not the lowest or highest water mark. He said that lakes are different as they fluctuate a lot. He said that it would be easier to detect the high water mark for a creek versus a lake.

Mr. Hantzsche said that the language from the Regional Quality Water Board refers to the highest anticipated water line as the regulatory requirement. He said that the area spreads out broadly in the lower portions of the sites.

Mr. Long said that the study, prepared by Mattern and Associates, said that because of the grading that occurred, it narrowed it down and that there is no longer a wide expand. He said that grading raised the bank. Therefore, it was his belief that the FEMA map was obsolete based on new conditions that have occurred. He felt that the grading helped the 100 year flood and that water would not leave the top of the bank. He said that the benefit of this monitoring is that it has found that red legged frog breeding is on the rise and that the frogs are not harmed by any pollutants in the water. He said that low levels of nitrate and nitrogen concentrations have been found and that the project is not getting pesticide runoff. He said that the benefit of monitoring shows that there is not a concern for water quality in the ponds and lakes. He said that the applicant proposes to revegetate 50% or more in some lakes, including shells and habitat that equals the buffer in areas that are not played. He indicated that the Fish and Wildlife Service has written a letter accepting all terms of the creek plan. He stated that he has data that would support that there is not a water quality concern at this time. He said that he would continue to monitor creeks and the project for problems in the future.

Mr. Sorenson stated that the applicant has some issues with exhibit C that is part of the resolution. He distributed a modified exhibit C document. As Mr. Long already addressed water quality, he stated that he would not address the issue at this time. He addressed proposed modifications to exhibit C. He referred to page 3, item 5 relating to the riparian habitat. He stated that the mitigation being requested prohibits use of the riparian corridor and goes beyond this by stating that land within 100 feet of the riparian corridor cannot be used. It also states that the 100 foot setback from the edge of the riparian corridor must be planted to mimic the existing riparian area. He noted that the City is requesting that the 100 foot setback be converted to something it never was and would not be if nature was left alone. He felt that the use was being prescribed by this mitigation. He did not believe that this was a mitigation. He said that the mitigation measure would eliminate portions of the golf course and the farmhouse that adjoins the riparian corridor that has been in place for over 100 years. The drastic changes proposed in this mitigation do not fall into the realm of evaluating the golf course as built. The changes are not mitigations but describe an alternative project. He felt that the alternative project fails the rule of reason. He recommended a slight change in the language to item 5.g., offering a change to mitigate either on site or off site for encroachment into the riparian setback. He said that the applicant may not be able to offer land in the same drainage area. He would like the option to find a similar drainage where he could find off site acreage. (See Mr. Sorensen's submitted amended Exhibit C for changes.). He referred to page 6, item 8a4 relating to the agreement with the Fish and Wildlife Service that allows a 20 foot setback on the south side of the creek at the 6<sup>th</sup> hole. He requested that the applicant not be required to bulldoze the natural terrain and make it slope away from the creek. He indicated that the agreement with the US Fish and Wildlife Service is 30 feet from the center line of the creek.

Planning Manager Rowe clarified that the 30 feet from the higher water mark is the water quality setback required by the Regional Water Quality Control Board plan. He said that there is a 30 foot biological setback. To be consistent with Mr. Long's testimony this would have to be from the high water mark as opposed to the centerline of the creek.

Mr. Long indicated that the creek is not wide or deep. If the City wants to use the top of bank as being the upper level, he would agree to this requirement as it would only make a two feet difference than using the centerline. He reiterated that the Fish and Wildlife Service requests the use of the centerline. He stated that the project proponent is trying to adhere to the letter dated July 15, 2003 from the Fish and Wildlife Service definition as well. He noted that the letter states the use of centerline. He said that he would be willing to work with the Fish and Wildlife Service and improve the definition.

Council Member Carr agreed that the City needs to be consistent and find a point from where it is going to measure and be consistent throughout (e.g., from centerline, top of bank or high water mark). The Council will need to work on the definition in order to be consistent.

Planning Manager Rowe said that the July 15 letter is correspondence that the Fish and Wildlife Service provided in response to the City's consultation with agencies in processing a temporary use permit. He stated that this was not a letter submitted to the City as part of the EIR process. He said that their official correspondence relative to this document is dated February 4, 2004.

Mr. Long submitted a letter from the Fish and Wildlife Service that details mitigations. He said that a mitigation requires the applicant to offset the affects to serpentine soil, red legged frog, and tiger salamander habitat during grading. He indicated that this letter is contained in the document of the revised and final EIR.

Planning Manager Rowe stated that the correspondence referred to by Mr. Long was not contained in the draft or final EIR.

Consulting Attorney Beers indicated that the July 15, 2003 letter from the US Fish and Wildlife Service is part of the administrative record. He stated that it is an exhibit to the draft EIR. He felt that it was important to place the letter in context, indicating that the letter deals with mitigations of the impacts for prior construction of the golf course and not with the impacts of ongoing operations and maintenance of the golf course. He stated that there are two different topics in the environmental review: 1) ongoing operation and use for which the water quality setbacks are proposed and discussed at 50 feet; and 2) the prior impacts occurring from the construction of the golf course in which the Department of Fish and Wildlife Service claims that serpentine habitat was lost and impacted the red legged frog habitat. Therefore, the letter deals principally with mitigations for the past impacts and not with apparent mitigations for ongoing water quality impacts and the need for setbacks. He said that the letter contains a paragraph about a setback but that it was in the context of the Service's concern for biological issues and the protection of listed species. He noted that the Service ends their letter by stating that at the time of Section 7 consultation, it expects to work with the applicant further to identify ways of minimizing affects to listed species resulting from the ongoing use and maintenance of the golf course. He said that as far as the record indicates, section 7 consultation has not occurred and there is nothing in the record that reflects an agreement between the applicant and Fish and Wildlife Service. He acknowledged that

there is a letter dated July 15, 2003 and a letter in response to this letter from the applicant that agrees with some of the contents of the letter and rejects other items. The letter mentions that there would be a necessity for a written agreement between the parties. However, he noted that the administrative record does not have a copy of a written agreement between Fish and Wildlife Service and the applicant that has been executed by the parties. He said that he did not know if it was previously stated whether the test results distributed to the Council were previously submitted by the applicant for review by the City's consultants. He said that there is evidence in the record from the consultants as to what the water quality impacts are and what mitigations measures are appropriate. Without further analysis of these test results by the City's consultant, he stated that the Council can consider the letter for what it believes it is worth in the context of the decision it is making.

Mr. Hantzsche addressed the hydrology issue, including the 100 year flood condition as determined by the applicant's hydrologist. He said that the creek goes through a boxed culvert at Foothill Boulevard that is 12 feet wide and 8 feet high. This is the amount of water that is anticipated to go through the creek at high water conditions. He said that under high flow conditions it can generate a lot of water run off in the water shed. With regards to the definition of the highest anticipated water line, a possibility would be to refer to the measurement from the highest anticipated waterline as determined by the Regional Water Quality Control Board as it is their criterion. He felt that the City could lean on this agency to make a site specific determination given all the information available to them. He said that the creek is approximately 80-90 feet across at the widest part.

Mr. Long agreed that Corralitos Creek has a wide plate. He noted that a dam exists that causes a backup of water that causes an impound. He agreed that the Council could ask the Regional Water Quality Control Board to make an interpretation.

Mr. Sorenson referred to Exhibit C, item 8b, nitrogen loading, number 3 (page 6). He said that the applicant is eager to prepare a nitrogen plan, indicating that the plan will be consistent with the existing methodology of testing the soils and plants to find out what nutrients are contained and to test the water to see how much nitrogen it contains. Also, to determine the need for fertilization based on the scientific evidence. He felt that an analysis may be difficult or impossible to go back and look at based on what the previous 40 acres did or did not do. He said that in the same section, item 10, is in conjunction with 8b3 and is onerous. He noted that the project is a 128 acre golf course. He said that the intent of the EIR was to evaluate the golf course as it was built. He felt that there was a logical inconsistency. Reducing the golf course to 40 acres as implied by taking 8b3 and 8b10 together would potential reduce the golf course to 40 acres. He did not believe that this would result in a mitigation but an alternate project. He indicated that the applicant requests that 8b10 be stricken because the first part of this condition would result in zero turf and the second part could potentially result in a 40 acre golf course.

Mr. Sorenson referred to page 11, item 12.d. which requires the golf course operator to monitor the ground water table in the area over time. Should the water table fall below critical level, the golf course shall be required to further reduce water usage in increments to be agreed upon by the City of Morgan Hill and the Water District. He stated that the water table is large and dynamic. He said that should the aquifer reach a critical level, the most likely reason for this is that the area is in a prolonged drought. Should this occur, he felt that the Santa Clara Valley Water District will issue the appropriate policies to all those who operate wells in the area and who use water from the aquifers. He did not believe that this

demand is related to an impact of the project but is a statement of public policy. He did not believe a public policy should be made in the confines of an EIR. He said that there are many other changes that are being requested but that he would not go over them in the interest of time. He felt that the other requested changes were self explanatory. However, he wanted to hit the highlights relating to water quality, red legged frog, nitrates in the groundwater and the issue of the depletion of the aquifer.

Mr. Sorenson referred to page 16, item 22. He stated that he did not believe that the Williamson Act is a matter that should be taken up in an EIR as it has nothing to do with the impacts of the project and is not a mitigation for any impacts. He said that this is a legal issue for land attorneys to debate. He said that his attorneys believe that the uses are to be consistent with the contract under the Williamson Act. He said that at present, he does not plan to withdraw from the Williamson Act. However, should it come to his attention that the use does not comply with the Williamson Act, an application for withdrawal would be submitted, indicating that they will obey all regulations.

City Manager Tewes noted that the Planning Commission recommended three conditions of approval that the applicant is now requesting be deleted.

Mr. Sorenson said that item 25 (page 16) is an interesting condition. He said that in response to an issue of local flooding brought up by a neighbor, the applicant asked representatives from the County to visit the site, examine the area, and help determine the cause(s) of local flooding. One area that the County found an issue with is at the corner of Maple and Foothill Avenues. It was found that a 24 inch pipe dumps into a ditch on Maple Avenue and runs down Maple Avenue at the northern face of the property. The water runs down Maple until it hits Foothill Avenue. He said that the pipe at Foothill is 8 inches. This results in a 24 inch pipe dumping into a ditch and then an 8 inch pipe that has to convey the same amount of water. When there is a significant rainstorm, the water runs over the top of Foothill Avenue, resulting in localized water on the street. The applicant asked the County if they would fix the problem and they stated that they would not because it is a City problem. He wrote a letter to the City stating that there is an issue with the pipe that crosses Foothill Avenue and requested that it be fixed. The response from the City was that the Institute should fix the pipe. He said that this is a difficult issue for them because he did not believe he has the authority to dig up a City street and lay new pipe. If they performed the work, the farmer might sue them. He said that it places the owner in a difficult position if such a condition is imposed. Regarding Item 26, while county representatives conducted their site visit, he inquired whose responsibility it was to clear the culvert along Foothill Avenue that caused localized flooding during a recent downpour. The County determined that the property was within their jurisdiction but that it is land owned by a private homeowner and that it is the responsibility of the property owner to fix the problem. He was surprised to see a condition that would require the applicant to go onto county land and try to upgrade a homeowner's property to improve flood control. He did not believe that this issue has anything to do with water leaving the site itself, but has to do with what the homeowner has done to their property downstream. Regarding item 28, he said that there is no planned water tank to be installed on site. When he submitted an application for a PUD, he listed all the uses as well as all the structures that are to be on site. He noted that a new water plan was not listed. He stated that he has worked closely with the Fire Chief, over time, to develop a fire suppression system. He said that there would be the use of the main irrigation lake and the pumps that service the site to provide fire water for the site. Therefore, there will be no water tank provided on site. Therefore, the premise of the condition is not valid.

Brian Schmidt, Community for Green Foothills, requested that in the future the City not approve illegal temporary use permits that have environmental consequences with no environmental documentation. He congratulated the City for the EIR process and for not placing too much political pressure on the expert to change the findings in such a way that might suit political interests. He said that it is unclear whether or not the take of endangered species will be allowed on the property prior to the issuance of a Section 7 or Section 10 take permit from the Fish and Wildlife Service. He said that the take would occur with almost anything in terms of operation, maintenance or play on the course. If allowed, it would be a violation of the Endangered Species Act. Regarding the Williamson Act contract, he stated that he has had several discussions with the Department of Conservation and Santa Clara County. He said that the County regards the cancellation of any large tract of land from the Williamson Act as a significant impact. He noted that this has not been defined as a significant impact in the EIR. He said that the City is taking the perspective that a golf course operation is legal under the Williamson Act contract and therefore can operate under the contract. He stated that this is incorrect. He said that there is an issue of a deferred environmental assessment which occurs on item 12b contained in exhibit C. It states that in lieu of performing the mitigation that has been required under the EIR, the project proponent can conduct a study for reducing ground water impacts. He felt that this was a violation of the California Environmental Quality Act. Should the City allow the project proponent to conduct an environmental assessment six months from now, what would Mr. Gamboa's recourse be should he disagree with the assessment? He stated that environmentalist need to review the environmental documentation for the project before being approved. Should the City reject its consultant's recommendation in support of items that cannot be raised at a later date, the City cannot approve the project. He stated that the City's appropriate course of action would be to recirculate the EIR. He said that the Fish and Wildlife Service letter dated July 15, 2003 states that they endorse all mitigation measures found in the draft EIR. The latest letter from the Fish and Wildlife Service would trump any previous letters.

Alex Kennett stated that he was speaking as the interim Director of the Chamber of Commerce, a member of the Economic Development Committee as well as the City's elected representative to the Santa Clara County Open Space Authority, District 1. He said that it would be great to have the Math Institute in Morgan Hill as it would help from a tourism and economic stand point. He was not sure where else Morgan Hill would get a world level institute of this kind in the foreseeable future. He said that he has heard from a reliable source that the design of the Institute will be magnificent and of high quality. He recommended that the process be done right, fair and that it not be punitive, honoring the environment. He recommended that the City utilize the amount of time necessary to conduct the review of the project and that both sides arrive at an equitable solution. He felt that there should be a balance in the economy and ecology in South County.

Bruce Matulich, San Martin resident, indicated that he resides below the golf course. He said that the Morgan Hill city limits forms an appendage around the golf course and that it is essentially surrounded by San Martin. He said that San Martin residents who surround the golf course are the ones impacted by the wall of trees that surround the golf course and impede views. The San Martin residents are the ones negatively impacted by the increased water flow and run off that has resulted in the area over the past few years. It is also San Martin residents who are negatively impacted by increased nitrate levels that are impacting the water system. It was his hope, as the City considers this project moving forward and the mitigation activities to be implemented by the developer, that the Council think hard and consider the

impacts to the City's neighbors who reside in San Martin. It was his belief that the nitrate issue is the most important issue, one that is being short changed. He felt that nitrates levels require more evaluation and analysis. In implementing the plans for a golf course, he felt that the owner can implement a fertilization and pesticide plan that will minimize negative impacts to the nitrate levels in the area. He said that several months ago, some of the neighbors met with Mr. Sorenson. There was discussion about the nitrate issue. He said that Mr. Sorenson has indicated that the plans in place and the activities taking place at the golf course are improving the water quality in the area. If this is the case, he felt that golf courses should be built all over South County in order to improve water quality. He felt that this was an irresponsible comment and that it was his hope that the City evaluates the nitrate impact to the neighboring areas as he did not believe that it has been given the attention that it should receive.

Rich Gamboa, Foothill Avenue resident, indicated that the Planning Commission required the submittal of a detailed landscape plan and that it would be the City's purview to determine whether or not the trees should be diminished and whether there should be view corridors. He said that it appears that this is a condition that is being considered by both parties. He stated his support of the project as it brings wonderful things to the community. With a little flexibility on both sides, he felt that the project can achieve resolution. He requested that the Council not forget about the nitrate issue as a lot of residents are dependent on wells. He recommended that the nitrogen control plan be expanded to include monitoring of neighboring wells as the residents downstream will be the ones who will be affected financially in terms of property values. He cautioned the City to error on the side of protecting the neighboring residents of San Martin who border the property when it comes to water issues.

JJ Vogel stated that he was not in attendance to oppose the Math Institute as it is a positive use but that he was in attendance to oppose Mr. Fry breaking the law and encroaching the homeowners in the area. He wanted answers to the questions he asked a few months ago: 1) Why did the City allow the property owner to break the law? 2) Will the City allow him or anyone else to break laws in the future? He stated that he would like the views of the hills opened up again, safe drinking water, and runoff to be contained. and less traffic from golf tournaments. He did not want to see individuals get away with breaking the law just because they have money to buy individuals off or to have give a ways. If the City is going to give Mr. Fry whatever he wants, he also wants his requests satisfied and guaranteed in writing. He stated that he would fight the City based on consumer rights.

Darlene Vogel, adjacent resident, said that with the construction that has taken place the past seven years, it has caused her a lot of problems/headaches. She stated that she was insulted by the comment that the pipe repair was her responsibility when the people constructing the golf course were the ones who drove over her driveway and smashed the pipe. She said that there have been problems with nitrates. She said that the view outside her windows is very disappointing.

Brook Bailey felt that the town would be positively affected by Fry's plans. She said that it is time to turn to arts and academics. She stated that the construction of a math institute will place Morgan Hill on the map and will bring a great amount of business to the community. She felt that the Math Institute has given so much to the community and will continue to give to the community. She requested that the Council support the project so that the Math Institute can complete their dreams.

Craig Breon, Santa Clara Valley Audubon Society, said that it has never been a goal to stop the golf course nor the Math Institute, but to help the City with the process. He informed the Council that he submitted a letter today requesting that it look at the language contained in item 12a. He recommended that staff be allowed to review the requested changes based on this evening's discussions, cleaning some of the language and deleting items as necessary. He stated that the Audubon Society supports the additional mitigation measures as they relate to the primary environmental concerns in terms of wildlife habitat, water quality/quantity, etc. Should the Council support the applicant's alternative measures, the Council will have a number of problems. He felt that some of the alternative mitigation measures appear to be less protective. There is the issue of whether it would change things such that the City believes that the EIR should be recirculated to determine whether the alternative mitigations are equivalent, not as equivalent, or less protective. He argued that the Council should rely on its staff/expert's recommendation as these issues have been discussed for some time. He said that there may not be a significant problem now with pesticides or chemical runoffs as buffers are intended to reduce the chance of a problem in the future. He did not believe that the Council can rely on the fact that everyone will always apply the chemicals or other things to the golf course in the most efficient and environmental manner.

Mr. Breon noted that the EIR states that the objective of the project is a golf course that can be a recreational amenity to the Math Institute. He did not believe that you need 120-200 acres of turf, and a 760 yard par course. Their vision of a golf course is different from the one that has been proposed. He said that you can build a quality 18-hole golf course with all of the mitigation measures as proposed, providing the Council clarifies some of the issues. He said that the project objectives can be achieved using these mitigation measures. However, the golf course will change significantly. He said that this change will fall on the Math Institute because the golf course proceeded without proper permits. He said that it was ridiculous to state that if you move a t-box away from the creek that it will cause grading that will damage the creek while at the same time claiming that no damage has been done. He noted that the applicant had to grade the creek 3-4 feet in the first place. He felt that grading, in this situation, can be carefully done. While he urged the Council to approve the mitigation measures as proposed by City staff, with some adjustments, he stated that he is willing to sit down and discuss possible alternative mitigations for some of the issues where they seem to conflict. Everyone will need to agree that the alternate mitigation package is indeed superior. Otherwise, he urged the Council to approve the mitigation measures as proposed.

Planning Manager Rowe noted that there was a question regarding nitrogen loading found on page 6 of Mr. Sorenson's edited version of exhibit C. He said that Mr. Sorenson is indicating that the nitrogen loading from all sources would not exceed nitrates that would occur for the 40 acre golf course. He stated that the operative words in the sentence are "from pre project conditions." This translates to nitrogen loading from the entire site and not just the 40 acre golf course.

City Attorney Leichter clarified that the condition looks at the nitrogen loading for the entire site. It was her belief that the applicants believe that you look at the nitrogen for the 40 acres of the pre existing golf course. She stated that this was not the intent of the condition and that staff can clarify the condition.

Mayor Kennedy felt that it would make sense to delete the parenthetical phrase.

City Attorney Leichter indicated that staff has met and considered the testimony that was placed into the record this evening. She indicated that Ms. Yesney would present a few comments on the overall quality of the testimony and how staff believes it affects the mitigation measures that have been proposed.

Ms. Yesney indicated that she has reviewed information that has been provided this evening, including some of the proposed modification to the mitigation measures. It was determined that there is no new scientific evidence provided that would support a finding that the mitigations proposed are equivalent in the degree to which they would reduce environmental impacts. She said that there are two points that warrant clarification. She would address the first and Mr. Stephens would address the second point. She said that the first point is the Williamson Act contract and whether or not it should be addressed in the EIR. She stated that one of the thresholds of significance for land use impact, identified on page 20 of the draft EIR, and which is drawn verbatim from the CEQA guidelines, states that a project would have a significant impact if it conflicts with any applicable land use planning policy or regulation of an agency with jurisdiction over a project including, but not limited to the General plan, specific plan or zoning ordinance adopted for the purpose of avoiding or mitigating an environmental affect. She stated that it was her belief, a practice that is widely reflected throughout the State of California, that a use in conflict with a land conservation act contract falls under this criterion. She indicated that she identified the fact that the golf course use appears to be in conflict with a land conservation act contract and that the mitigation for reducing, avoiding or eliminating the impact was non renewal or cancellation of the contract. Thus, the reason it is addressed in the EIR. She said that this is separate from the loss of farmland. She indicated that the Department of Conservation at the State level would administer the contract but noted that the contract involves the City of Morgan Hill. It was her belief that it was partly within the Council's purview whether or not to renew the Williamson Act contract.

City Attorney Leichter said that when the land was annexed into the City of Morgan Hill, the City took over the responsibility for the Williamson Act contract. Therefore, it would not be the applicant who would be filing a notice of non renewal but that City who would submit the notice of non renewal. She said that it would be the City who would determine if in fact the use is out of compliance. She indicated that there are specific uses associated with this parcel and that the contract is included in the draft EIR. She stated that the Williamson Act does not allow for a recreational golf use, noting that most of the current Williamson Act contracts do allow for more open space recreational uses. She said that this is a very old Williamson Act contract and that the requirements for a Williamson Act contract today are specific in terms of showing a benefit to agricultural production. She did not believe that the applicant would be able to make the link to ongoing agricultural production. She indicated that staff could examine this if it is the Council's direction. She said that a non renewal is the most expeditious option to resolve this as a cancellation would result in a much lengthier time. As this contract is so old, the City could file a notice of non renewal and have it become effective much more quickly versus a notice of cancellation.

Mr. Stephens said that he looked at the suggested changes to item 5g. He noted that the applicant is requesting to add the words "or similar" drainage. He stated that the wording is too vague to determine whether it would be an equivalent and adequate mitigation. He said that a similar drainage may occur near Hollister or Marin County. However, it is felt that this would be too distant from the location at which the biological impacts are occurring for this to be considered an adequate mitigation. He said that



there is a strong preference, biological and from the resource agencies, for mitigations to be provided on site, if feasible, so that it is as close to the location of the original impacts as possible. This would result in fully and adequately mitigating the impacts. He stated that there is a lack of detail where off site mitigations might be provided for him to determine whether it would be adequate. Further, the applicant is implying that they would be allowed to encroach as much as they want into the setback, possibly eliminating a substantial portion of the setback area. If the applicant was to encroach into the setback substantially, there would be a cumulative affect that would take place, biologically, where you would have an affect that has not been addressed in the analysis to date (allowing activity close to the riparian corridor).

Council Member Chang inquired whether there were concerns with the other amendments being requested by Mr. Sorenson.

Ms. Yesney said that it was her belief that the alternative mitigations being proposed are not equivalent, do not reduce the impacts to less than significant and that there is no scientific basis provided in most of the cases to support a finding that they would be equivalent. She said that the riparian setback issue sounded plausible. However, when reviewed closer, it was realized that there were a number of unanswered questions. It was felt that the Council may have questions about the alternate wording relating to drainage. She said that there was a question whether the Williamson Act should even be included in the EIR. She felt that it was appropriate to explain that there was a threshold of significance that related to the Williamson Act agreement. This is the reason reference to the Williamson Act was included in the EIR.

Mr. Sorenson noted that a speaker asked a question about the take of red legged frogs on site. He said that the applicant has worked closely with the US Fish and Wildlife Service over the past few years. One of the fruits of this work is the agreement they have with them concerning the offsite mitigation addressed earlier as well as the undulating buffer on site. In addition to this, they have submitted a section 10 application which is one of the two alternatives listed in the exhibit to work with the US Fish and Wildlife Service. He felt that the applicant has complied with the US Fish and Wildlife Service requirements. Therefore, he did not believe that this was an issue at this time. He said that another comment was made about the wall of trees and that individuals found this to be objectionable. He stated that a condition allows for the submittal of a landscape plan to be reviewed by the City and that it remains in the document. He said that both the City's consultant and the applicant's consultant now agree that there is no increase runoff from the site. He said that County representatives found that the cause of flooding at some of the local homeowners' sites was caused by other homeowners changing drainages on their site or eliminated drainage easements, diverting water. He did not believe that drainage problems were a result of the project. Regarding the comments relating to increased nitrate levels in the drinking water wells, he indicated that this is a problem found in the entire basin. He said that the Santa Clara Valley Water District has a test well located across the street from the golf course. The test well has shown that over the past three years nitrate levels in this well have gone down. He felt that the facts dispute the allegations that the golf course is increasing the nitrate levels in the area. Regarding item 5g, the riparian habitat, he stated that he would be willing to add the phrase "similar drainage in Santa Clara County" if that would satisfy the Council.

Mr. Stephens indicated that the use of the term “county” is an arbitrary geographic delineation that does not relate to biological resources. He said that what is typically required is to be some distance or within the same watershed. He said that more specificity that pertains to the biological resources would be useful. He stated that the City will still have the remaining cumulative affect of loosing the very function of the setback area. He said that the proposed amendment would require further analysis and thought.

Planning Manager Rowe informed the Council that the source of water will be from wells. He indicated that the Fire Department refers to this as a status water source. Whatever is available in the pond is what will be available to suppress a fire as opposed to having a water main where there is a replenishing source of water coming from a hydrant. He stated that the applicant will need to store enough water to put out a fire. He said that the EIR is requiring adequate water storage on site and that the amount will depend on the type of construction and material used for the Math Institute building. He said that this could be as much as 153,000 – 350,000 gallons of water storage. He said that one problem with the pond is that it is an irrigation pond that is drawn down to water the course. Therefore, the amount of water available will fluctuate from this particular source. He informed the Council that the Planning Commission expressed concern with a water tank the size of a municipal water tank being highly visible if placed on the ridge and its visual impacts. Thus, the recommendation that the water tank be constructed offsite.

Mayor Kennedy said that he has seen many lakes used for fire suppression by restricting the drawdown levels. He inquired whether maintaining a certain level of water in the lake was possible.

Planning Manager Rowe stated that the Fire Department was not averse to using the irrigation pond to augment the water supply. However, they do not feel that the pond, in itself, was sufficient as a water source. He said that the amount of water that needs to be stored is a function of the building material to be used in construction. He said that it is the Fire Department’s position that in addition to the water source available to them in the irrigation pond, the applicant would need to supplement this with additional water storage. He indicated that this is an environmental issue and is addressed in the EIR under the public service section, page 82 of the draft EIR. He stated that the applicant is proposing to delete this requirement.

Mayor Pro Tempore Sellers recommended that the word “if” be inserted to mitigate the applicant’s concern.

City Attorney Leichter stated that the City’s environmental consultants suggest that that what the applicant’s alternate mitigations proposes does not bring the impacts to a less than significant level.

Council Member Carr noted that Mr. Stephens made a comment that the proposal for an offsite replacement has not been studied in terms of its cumulative impacts.

Mayor Kennedy noted that the applicant has submitted proposed revisions to exhibit C. The City Council has heard comments from the City’s consultant that the proposed amendments do not adequately mitigate the significant impacts. He felt that the options before the Council are: 1) proceed with what the City’s consultants have recommended; 2) accept the proposed changes and recirculate the

EIR; or 3) for the Council to review each proposed amendment point by point to see which ones the Council could support.

City Attorney Leichter stated that the Council has the evidence presented. The question is whether the evidence supports the alternative mitigation measures. If the Council believes it does, the Council has to state why as staff will need to place these in findings to support the mitigation measures. As an alternative, staff would have to conduct an additional study on the mitigation measures to see if they are in fact alternatives and return to the Council with a recommendation. This would include recirculation of the EIR.

Council Member Tate noted that the City's consultant does not agree with the applicant's requested revisions to exhibit C. He did not believe that there has been dialogue as to the reasons for disagreement to find a solution. He felt that this should have been a process undertaken before coming to the Council. He felt that there might be some compromises that could be made.

Council Member Chang said that in reviewing the letter from the Committee for Green Foothills they addressed a couple of points. She stated that she would like to include this Committee in discussions. She inquired whether this item could be postponed for a couple of weeks or a month to see if the review/approval can be in a better place than it is at this time.

Mr. Beers said that there is no reason the Council could not convene all parties and have them work out a new set of mitigation measures. He noted that the Council has a set of mitigation measures that have been developed over some time that have scientific backing. The Council also has a proposed set of alternative mitigation measures that do not have scientific foundation that have been presented. He stated that no evidence has been presented this evening to indicate whether or not offsite mitigations would produce an impact to a less than significant level or create a whole new set of impacts. The Council may wish to ask the consultants if there is room for discussion for some of these items. He said that as it stands, the City's consultants have given their opinion that the minimum mitigation measures required are the ones that have been proposed.

Council Member Chang felt that it was up to the Council to make the decision on how to reach the best place for the City and the environmental groups; one that also works for the applicant. She did not believe that a decision needs to be made this evening. She felt that given the opportunity, the applicant can come up with a superior plan. She noted that the neighbors raised concerns about the trees, flood and nitrate levels. She felt that these items should be clearly defined. She felt that it was up to the City to decide whether the trees are needed or to be removed. She recommended that this item be continued for two weeks. If by that time the City's consultant does not believe that the alternate mitigation measures are suitable ones, the Council can proceed from that point.

City Attorney Leichter noted that these mitigations have been in place for at least 18 months and that the applicant now comes before the Council with modifications to these mitigation measures. If the applicant comes forward with new evidence, staff would recommend recirculation of the EIR. She did not believe that the objective this evening was to work out a compromise but to satisfy the City's obligation under CEQA which is very specific. She stated that the Council's decision must be based on the scientific evidence contained in the record before it. Staff does not believe that scientific evidence

has been submitted. However, staff could talk to the applicant to determine if there is scientific evidence in the next two weeks and then report back to the Council. However, the Council needs to understand that staff may be reporting that there is additional evidence that necessitates recirculation of the EIR.

Mayor Pro Tempore Sellers stated that should the Council proceed this evening with the EIR, the applicant may state that the mitigation measures are so onerous that they affectively destroy the integrity of the entire project. He inquired as to the applicant's recourse/options.

Mr. Beers said that the applicant has the option of suing the City. The applicant also has the option of requesting revisions. These revisions might be handled with a minor environmental review such as an addendum. If there were more basic changes, this would require a focus level environmental review regarding the particular changes that might necessitate a supplemental EIR. However, the supplemental EIR would be devoted to the specific changes that would be taking place. These are the two remedies that the applicant would have.

Mayor Pro Tempore Sellers stated that he was trying to figure out, without having to reopen the entire EIR, whether there was a more direct, less broad based action versus recirculating the entire document.

Mr. Beers said that the Council has to hold off on the certification of the EIR until such time that it is ready to decide on all items. If the Council decides that it wants to defer certification of the EIR, the time that is deferred could be used in an effort to resolve the questions in a manner that was suggested earlier. Should the Council decide that it wants to go ahead and approve the EIR at this point, he felt that there is substantial evidence in the record to support this action across the board on all of the mitigation measures. The time after the certification can be used to resolve remaining issues, with the understanding that an amendment can be conducted or a focused recirculation/supplementation of an EIR can be undertaken at that point.

Mayor Kennedy inquired whether it would require the recirculation of the EIR should the Council find justification to make certain changes. The Council could request the City Attorney and consultants return with options that could be discussed at the Council's next meeting.

Mr. Beers indicated that the City's attorneys and consultants can return next week but that he did not know whether the answers would be any more refined than they are this evening. The Council is asking that judgment calls be made after having received specific input on particular items. He suspects, from the discussions he has heard so far, that the City would still end up in a situation where there may be some items to which there are significant impacts at issue and mitigations that are not agreed upon by the City and the applicant. In these circumstances, the options would remain as outlined. He said that the Council can approve the EIR at this time and address the problems later or the Council can defer the EIR certification at this time and try to see if the problems can be addressed before certification.

Mayor Kennedy felt that there may be some issues that can be agreed upon, narrowing down the issues remaining. He clarified that he would request that staff review exhibit C as submitted by the applicant and determine whether these mitigation measures are supportable or whether it would require recirculating the EIR.

Council Member Tate felt that staff may need to return with clarifications on some of the items.

Mayor Pro Tempore Sellers stated that delaying this item a few weeks will allow clarification of issues.

Council Member Carr inquired whether the public would be able to comment on any addendums to be prepared.

Mr. Beers said that an addendum is not required to be publicly circulated nor requires that there be opportunity for public comment. However, the Council could decide that it wants public comment and that the document be circulated.

Council Member Carr stated that he would support making this process an open one. Should the Council be willing to send this back because of concerns, he did not believe that the Council should be afraid to recirculate the EIR. Should there be a need to recirculate the EIR, the Council needs to receive a stipulation from the applicant that they will agree to pay for these costs as they are adding cost to the process. The applicant will also need to be willing to accept the risk that their temporary use permit may expire if the environmental review/certification is not completed in time.

City Attorney Leichter said that it could be that staff may return to state that there is scientific evidence to support the equivalent mitigation measures. If there isn't, staff would return to the Council to advise that there needs to be more scientific evidence developed and/or the Council may need to look at the impacts that may require recirculation of the EIR.

Council Member Tate felt that the main issue raised was that of the redesign attributable to the setback. He felt that the Council found an area where the consultants agreed that the mitigation could be reworded. He was hoping that the City could find other areas of compromise.

Council Member Chang recommended that the Council inquire whether the applicant would agree to recirculate the EIR, if necessary.

City Attorney Leichter clarified that the process would be that staff is to go back and look at the mitigation measures to see if there is sufficient scientific evidence to support the finding of equivalency. She said that staff does not believe that there is sufficient scientific evidence based on what was heard this evening. She said that staff would report back to the Council of what scientific evidence would need to be developed and staff's estimation of whether the submission of the new scientific evidence would require recirculation. She said that these are the initial steps that need to be taken before deciding to recirculate the EIR.

Mr. Sorenson stated that the applicant has always been willing to work with City staff and the consultants in resolving these issues. In response to the question of whether the applicant would be willing to pay for the additional consulting time from this time forward, he responded "sure."

Council Member Carr noted that there is some risk involved with the temporary use permit should the EIR document end up being recirculated for 3-4 months.

Mr. Sorenson stated that it was his belief that the only remaining item of the temporary use permit is the screen on the section side of the pump to keep the tadpoles from entering the pumping system. He said that the US Fish and Wildlife Service has given the applicant a verbal that they like the creek restoration plan at this point. The Santa Clara Valley Water District has done the same with the monitoring well plan. He felt that the applicant was down to one condition that should be satisfied in the near future.

Mayor Pro Tempore Sellers felt that the direction the Council is heading is to put this item off for a few weeks requesting that staff address the alternative mitigation measures. He said that there are three different issues: 1) clarification on a few of the points; 2) review whether the proposed mitigation from the applicant's last minute proposal is sufficient, or whether or not additional scientific investigation is needed, and whether this scientific undertaking would require recirculation of the EIR; and 3) what is the best course of action (e.g. certifying the EIR as is, allowing the applicant to propose addendum, taking their legal recourse if they have issues with the EIR; or recirculate the EIR should the Council adopt what is being proposed). He requested that the applicant give thought to this in the next few weeks.

City Attorney Leichter requested that the Council clarify whether it is limiting staff's review to the items that the applicant has stated in their version of the conditions of approval.

Council Member Chang felt that some of the neighbors' concerns need to be considered. She noted that the Committee for Green Foothills requested clarification on some items.

Mayor Kennedy inquired whether the Council should certify the EIR this evening and proceed with an amendment. He felt that the neighbors' concerns would be more appropriately addressed as part of the zoning application.

Mr. Sorenson stated that the applicant would prefer to work with the City in the intervening time (a few weeks or a month) to work through the issues to satisfy the City's consultant and the applicant.

City Attorney Leichter indicated that it was not her understanding that staff was to engage in negotiations with the applicant. It was her belief that the scope of work from the Council to staff was that it review the document submitted by the applicant this evening and investigate whether there is current evidence in the record sufficient to support the mitigation measures. If not, staff to identify what is lacking and how it is to be obtained. In response to Council Member Tate's question, she indicated that there has been dialogue with the applicant for the past 3½ years.

Council Member Carr inquired whether Mr. Sorenson believes there is scientific data included in the record to date or whether this is new evidence for the Council to consider.

Mr. Sorenson responded that he would have to review each requested amendment to find where he has data and where there is no data. He indicated that in general he believes that there is scientific data or basic logic to support the requested modifications. It was his believe that information has been submitted in the past and may have been interpreted differently from his team and that of the City.

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**Action:**        *On a motion by Council Member Chang, seconded by Mayor Pro Tempore Sellers moved, the City Council unanimously (5-0) **agreed** to extend the curfew for this meeting.*

Mr. Sorenson indicated that the applicant proposes to defer this item for approximately a week to give staff time to further review the changes proposed to exhibit C.

City Manager Tewes inquired whether in the intervening period Mr. Sorenson and his group could identify where in the record the scientific evidence was introduced that supports the equivalence of the alternative measures. Receiving this information would help expedite the review process.

Mayor Pro Tempore Sellers inquired whether a week was a reasonable time to undertake this extra work.

City Attorney Leichter said that it would be appropriate to give the applicant a week to identify the scientific data and to give staff another week to review the identification and make the determination. She indicated that staff could return to the Council on June 23 or the first meeting in July.

Mayor Kennedy noted that Ms. Vogel has indicated that her storm drain culvert was smashed by the construction work. He inquired whether Mr. Sorenson knows whether this is true or not.

Mr. Sorensen stated that he would investigate Ms. Vogel's issue.

No further comments being offered, the public hearing was closed.

Council Member Chang noted that there was an issue regarding the mitigation plan from the Audubon Society. She inquired where this issue can be addressed.

City Attorney Leichter indicated that should the Council change the mitigation measures it may change the scope of the mitigation monitoring plan.

Mr. Breon stated that he requested clarification on one of the mitigation measures as it was difficult to understand. He felt that it would be possible to craft alternative mitigation measures that almost everyone would agree are superior to what is before the Council. It was his hope that he would have enough time to work with staff on trying to put together something that is clearly superior.

**Action:**        *On a motion by Council Member Tate and seconded by Council Member Chang, the City Council unanimously (5-0 vote) **continued** this item to July 7, 2004, requesting that the applicant refer to the record to where the data supports the alternative measures.*

**2.        ZONING AMENDMENT, ZA-03-03: FOOTHILL-THE INSTITUTE – Ordinance No. 1689, New Series**

**Action:**        *On a motion by Council Member Chang and seconded by Mayor Pro Tempore Sellers, the City Council unanimously (5-0) **Continued** this item to July 7, 2004.*

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**FUTURE COUNCIL-INITIATED AGENDA ITEMS**

No items were identified.

**ADJOURNMENT**

There being no further business, Mayor Kennedy adjourned the meeting at 11:35 p.m.

**MINUTES RECORDED AND PREPARED BY:**

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**IRMA TORREZ, CITY CLERK**